

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

|                                 |   |                          |
|---------------------------------|---|--------------------------|
| OLIVER BATTIE, JR., #02049453   | § |                          |
| Petitioner,                     | § |                          |
|                                 | § |                          |
| v.                              | § | CIVIL NO. 3:17-CV-1191-D |
|                                 | § |                          |
| LORIE DAVIS, Director TDCJ-CID, | § |                          |
| Respondent.                     | § |                          |

**ORDER**

The United States Magistrate Judge made findings, conclusions, and a recommendation in this case. Petitioner filed objections on September 28, 2018,\* and the undersigned district judge has made a *de novo* review of those portions of the proposed findings, conclusions, and recommendation to which objection was made. The objections are overruled, and the court adopts the findings, conclusions, and recommendation of the United States Magistrate Judge. It is therefore ordered that the petition for writ of habeas corpus under 28 U.S.C. § 2254 is denied.

Considering the record in this case and pursuant to Fed. R. App. P. 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the court denies a certificate of appealability. The court adopts and incorporates by reference the magistrate judge's findings, conclusions, and recommendation filed in this case in support of its finding that the

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\*On September 28, 2018 petitioner also filed a notice of appeal from final judgment, purporting to appeal the August 27, 2018 findings, conclusions, and recommendation of the United States Magistrate Judge. The court is not deprived by that notice of appeal of jurisdiction to act on the magistrate judge's findings, conclusions, and recommendation because an appeal from an unappealable order does not have this effect. *See United States v. Green*, 882 F.2d 999, 1001 (5th Cir. 1989) (notice of appeal from nonappealable order does not render void for lack of jurisdiction acts of trial court taken in the interval between filing of the notice and dismissal of the appeal); *United States v. Hitchmon*, 602 F.2d 689, 694 (5th Cir. 1979) (en banc) (contrary rule would leave district court powerless to prevent intentional dilatory tactics). Accordingly, the court now proceeds to consider the portions of the proposed findings, conclusions, and recommendation to which objection was made.

petitioner has failed to show (1) that reasonable jurists would find this court’s “assessment of the constitutional claims debatable or wrong,” or (2) that reasonable jurists would find “it debatable whether the petition states a valid claim of the denial of a constitutional right” and “debatable whether [this court] was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S.473, 484 (2000).

If petitioner files a notice of appeal,

( ) petitioner may proceed *in forma pauperis* on appeal.

(X) petitioner must pay the \$505.00 appellate filing fee or submit a motion to proceed *in forma pauperis*.

**SO ORDERED.**

October 3, 2018.

  
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SIDNEY A. FITZWATER  
SENIOR JUDGE